Supreme Court, U.S.
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011569 APR 17 2002

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No. 01-

IN THE

Supreme Court of the United States

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, LOCAL 1922,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD & SEABOARD MARINE LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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127 pp

QUESTIONS PRESENTED

This Petition concerns unresolved questions of federal law and a conflict among various Circuits regarding union and employee access to judicial review of a National Labor Relations Board (the "Board") representation decision. Congress enacted the National Labor Relations Act (the "Act") to protect workers from inherent inequality in bargaining strength and to ensure that employees enjoy the right to organize and benefit from collective bargaining. 29 U.S.C. § 151. Congress created the Board to promote union strength and ensure that employees enjoy full freedom of association, self-organization, and designation of representatives guaranteed under the Act. 29 U.S.C. §§ 153, 157. Courts have historically afforded incredible deference to the Board to advance the Act's considerations. Like any administrative agency, however, the Board should be subject to checks and balances. If the Board violates due process or disregards its statutory obligations, parties governed thereunder must have the ability to obtain judicial relief. This is the underlying premise of the following questions presented for certiorari review:

1. Whether a district court has subject matter jurisdiction to provide declaratory relief when the Board violates due process rights by disregarding its own rules and regulations;

2. Whether the Board's violation of its internal rules or guidelines should be treated as a violation of an express statutory mandate, thereby vesting a district court with jurisdiction to render relief under the doctrine articulated in *Leedom v. Kyne*, 358 U.S. 184 (1958).

3. Whether a district court has jurisdiction to render declaratory relief pertaining to a Board representation decision when the Court's exercise of jurisdiction will not interfere with a Board-ordered election and the limitation on review of a representation proceeding was intended to prevent employers, rather than unions, from seeking judicial relief that could delay the election machinery.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	5
I. A District Court Should Have Subject Matter Jurisdiction To Render Declaratory Relief To An Aggrieved Party When The Board Disregards Its Own Rules, Thereby Violating A Party's Due Process Rights.	5
A. An injured union and employees seeking its representation should have a forum for relief when Board action violates its due process rights.	5

Contents

Page

B. Whether the Board's disregard for its own rules and operating procedures constitutes a violation of due process rights, thereby supporting district court jurisdiction under *Fay v. Douds*, remains an open question. 13

II. Whether The Board's Rules And Regulations Should Be Treated As Statutory Mandates For Applying *Leedom v. Kyne* Is Unresolved. . . 17

III. A Union Should Have The Right To Declaratory Relief Because The Principle Of Non-Reviewability Was Created To Protect Unions And Employees. 18

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases:

Accardi v. Shaughnessy,
347 U.S. 260 (1954) 14

Amalgamated Meat Cutters, etc. v. Allen,
298 F. Supp. 985 (W.D. Mo. 1969) 11

Associated Builders & Contractors of Texas Gulf Coast, Inc. v. U.S. Dept. of Energy,
451 F. Supp. 281 (S.D. Tx. 1978) 15

Atkinson Lines, Inc. v. United States,
381 F. Supp. 39 (S.D. Oh. 1974) 16

Bakery, Confectionery and Tobacco Workers' Intern. Union, Local 6 v. N.L.R.B.,
799 F. Supp. 507 (E.D. Pa. 1992) 11

Bivines v. Bowen,
833 F.2d 293 (11th Cir. 1987) 15

Blue Cross and Blue Shield of Michigan v. N.L.R.B.,
609 F.2d 240 (6th Cir. 1979) 12

Board of Governors of the Federal Reserve System v. M Corp. Financial Inc., et al.,
502 U.S. 32 (1991) 15

Cited Authorities

Page

Boire v. The Greyhound Corporation,
376 U.S. 473 (1964) 6, 7

Boyles Galvanizing Co. v. Waers,
291 F.2d 791 (10th Cir. 1961) 10, 11

Call v. Heckler,
647 F. Supp. 560 (D. Mont. 1986) 16

Catalytic Industries Maintenance Company v. Compton,
333 F.Supp. 533 (D. Puerto Rico 1971) 7, 11, 18

Cihacek v. N.L.R.B.,
464 F. Supp. 940 (D. Ne. 1979) 12

Fay v. Douds,
172 F.2d 720 (2d Cir. 1949) 9, 10, 11, 12, 13, 15

First Fed. Sav. and Loan Assoc. of Lincoln v. Casari,
667 F.2d 734 (8th Cir. 1982) 16

Florida Bd. of Bus. Reg., Division of Pari-Mutual Wagering v. N.L.R.B.,
686 F.2d 1362 (11th Cir. 1982) 11, 19, 20

Goethe House New York, German Cultural Center v. N.L.R.B.,
869 F.2d 75 (2d Cir. 1989) 18, 19

Cited Authorities

Page

Graham v. Caston,
568 F.2d 1092 (5th Cir. 1978) 16

Greensboro v. Hosiery Mills, Inc. v. Johnston,
377 F.2d 28 (4th Cir. 1967) 11

Groendyke Transp., Inc. v. Davis,
406 F.2d 1158 (5th Cir. 1969) 7, 11

Grutka v. Barbour, 549 F.2d 5 (7th Cir. 1977) 12

Hartz Mountain Corp. v. Dotson,
727 F.2d 1308 (D.C. Cir. 1984) 18

Hughes v. Getreu,
266 F. Supp. 15 (S.D. Ohio 1967) 12

Hupart v. Board of Higher Ed., City of New York,
420 F. Supp. 1087 (S.D.N.Y. 1976) 15

Int'l Assoc. of Tool Craftsmen v. Miller,
389 F. Supp. 1078 (E.D. Tenn. 1974) 11

International House v. N.L.R.B.,
676 F.2d 906 (2d Cir. 1982) 14

Kabeller, Inc. v. Busey, et al.,
999 F.2d 1417 (11th Cir. 1993) 15

Leedom v. Kyne,
358 U.S. 184 (1958) .....i, 9, 12, 15, 17, 18, 19

Cited Authorities

Page

Local 25, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, et al. v. Greene, 196 F. Supp. 772 (D.C. Mass. 1961) 10

McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978) 10, 13

McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916 (D.C. App. 1969), *cert. den.* 393 U.S. 1016 (1969) 11

Midway Clover Farm Market, Inc. v. N.L.R.B., 318 F. Supp. 375 (D. D.C. 1969) 12

National Maritime Union of America, AFL-CIO v. N.L.R.B., 375 F. Supp. 421 (E.D. Pa. 1974) 12

N.L.R.B. v. Difco Laboratories, Inc., 389 F.2d 663 (6th Cir. 1968) 14

N.L.R.B. v. Interstate Dress Carriers, Inc., 610 F.2d 99 (3d Cir. 1979) 7, 8, 11

N.L.R.B. v. Sav-On Drugs, Inc., 704 F.2d 1147 (9th Cir. 1983) 13-14

Powell v. Heckler, 789 F.2d 176 (3d Cir. 1986) ... 16

Cited Authorities

Page

Professional Assoc. of College Educators v. El Paso Cty. Community College Dist., et al., 730 F.2d 258 (5th Cir. 1984) 12

Sameena, Inc. v. United States Air Force, 147 F.3d 1148 (9th Cir. 1998) 14

Sav-On Drugs, Inc. v. Cuneo, 46 Lab. Cas. P. 17903 (D. N.J. 1962) 12

Semi-Alloys, Inc. v. Morio, 490 F. Supp. 422, 425 (S.D. N.Y. 1980) 10

Southern Ohio Coal Co. v. Surface Min., Reclamation and Enforcement, Dep't of Interior, 20 F.3d 1418 (6th Cir. 1994) 11

Squillacote v. Int'l Brotherhood of Teamsters, Local 344, 561 F.2d 31 (7th Cir. 1977) 11, 12

Teamsters, Chauffeurs, etc. v. N.L.R.B., 375 F.2d 966 (9th Cir. 1967) 11

United Fed. Of College Teachers v. Miller, 479 F.2d 1074 (2d Cir. 1973) 11

United States v. Nixon, 418 U.S. 683 (1974) 15

Cited Authorities

	Page
United States Metal Co. Employees' Assoc. v. United States, N.L.R.B., 478 F. Supp. 861 (W.D. Pa. 1979)	12
University of Vt. v. Vt., 748 F. Supp. 235 (D. Vt. 1990)	11
U.S. Pillow Corp. v. McLeod, 208 F. Supp. 337 (S.D. N.Y. 1962)	11
Weingarten, Inc. v. Potter, 233 F. Supp. 833 (S.D. Tx. 1964)	17
United States Constitution:	
First Amendment	12, 13
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	20
29 U.S.C. § 151	i, 1
29 U.S.C. § 153	i, 2
29 U.S.C. § 157	i, 1
29 U.S.C. § 159	1, 2

Cited Authorities

	Page
29 U.S.C. § 159(c)	4
29 U.S.C. § 160	1, 7
Other Authorities:	
29 C.F.R. § 101.21	2, 13
29 C.F.R. § 101.21(a)	2
29 C.F.R. § 102.51	1
29 C.F.R. § 102.67	1, 2, 3, 4, 13, 18
H.R. Rep. No. 972, 74th Congress, First Session, 5	7
Union Access to the Courts on NLRB Representation Decisions: The Potential for Declaratory Judgment Procedure to Provide Review, 37 Cath. U.L. Rev. 119 F. Frio	21

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed January 17, 2002 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Florida, Miami Division Dated March 14, 2001 And Filed March 19, 2001 ..... 3a

Appendix C — Decision And Direction Of Election Of The United States Of America Before The National Labor Relations Board, Region 12 Dated January 9, 1998 ..... 12a

Appendix D — Order Of The United States Of America Before The National Labor Relations Board Dated February 4, 1998 ..... 35a

Appendix E — Decision On Review And Order Remanding Of The Regional Director Of The National Labor Relations Board Dated February 5, 1999 ..... 36a

Appendix F — Decisions Of The United States Of America Before The National Labor Relations Board, Region 12 Dated March 26, 1999 ..... 41a

Appendix G — Relevant Statutory Provisions 83a

The International Longshoreman's Association, Local 1922 ("ILA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit which, after granting oral argument, *per curiam* affirmed a decision by the United States District Court, Southern District of Florida, dismissing ILA's case.

OPINIONS BELOW

The district court's opinion (per King, D.J.) dismissing ILA's Amended Complaint is published at 2001 WL 915375, 144 Lab Cas. P. 11, 120. The court of appeals' *per curiam* affirmance is not published.

STATEMENT OF JURISDICTION

The court of appeals issued its decision on January 17, 2002, making the petition for writ of certiorari due in this Court by April 17, 2002. ILA invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the National Labor Relations Act, 29 U.S.C. §§ 151, 157, 159, and 160, and 29 C.F.R. §§ 102.51 and 102.67, relevant to this petition are reprinted in Appendix G.

STATEMENT OF THE CASE

ILA is a labor union that sought to represent a group of Seaboard Marine, Ltd.'s employees sharing a community of interests in wages, scope of employment, and job characterization. ILA petitioned the Board to designate the

employees as a unit and to schedule an election, allowing the unit to vote for their desired union representative. Following an evidentiary hearing before a hearing officer, where the employees testified about their job duties and their desire to be grouped together, the Acting Regional Director concluded that the employees shared a community of interests, designated them as a unit, and scheduled an election (App. C at 30a). The unit voted for their desired representative, but the employer sought further review of the Acting Regional Director's Decision and Direction of Election and the Board impounded the ballots. The employer argued that only a wall-to-wall unit, comprised of all of its employees, would constitute an appropriate bargaining unit.

Board Statements of Procedure Sections 101.21 and 102.67 indicate that the Acting Regional Director's decision will be final, and expressly limit the Board's authority to review such a decision. As explained in Section 101.21(a):

> Pursuant to Section 3 [29 U.S.C. § 153] of the Act, the Board has delegated to its Regional Directors its powers under Section 9 [29 U.S.C. § 159] of the Act to **determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings and determine whether a question of representation exists and to direct an election or take a secret ballot under Subsection C** or E of Section 9 and certify the results thereof. . . . The Regional Director may at any time transfer the case to the Board for decision, **but until such action is taken, it will be presumed that the Regional Director will decide the case. In the event the Regional Director decides the issues**

> **in a case, the decision is final subject to the review procedure set forth in the Board's Rules and Regulations.**

(emphasis added). As set forth in Section 102.67:

> **Accordingly a request for review [of a Regional Director's decision] may be granted only upon one or more of the following grounds**: (1) That a substantial question of law or policy is raised because of (i) the absence of or (ii) a departure from officially reported board precedent. (2) That the regional directors' decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party. (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error. (4) That there are compelling reasons for reconsideration of an important board rule or policy.

(emphasis added). The Board disregarded the foregoing limitations, however, and instead held that there existed "substantial issues warranting review" and accepted review of the Acting Regional Director's Decision and Direction of Election (App. D at 35a). Over one year after the unit employees voted, the Board disagreed with the Acting Regional Director. In its Decision on Review, the Board concluded that the Acting Regional Director's Decision and Direction of Election was arbitrary, and rejected her conclusion (App. E at 37a). The Board showed no deference to the Acting Regional Director's "final" Decision and Direction of Election. Upon rehearing, a different regional director concluded that only a "wall-to-wall" unit comprised

of all employees was appropriate (App. F at 78a). When ILA sought further review, the Board refused to consider the matter further, leaving the employees who originally sought to be represented by ILA subsumed within an oversized unit and without representation.

The Act does not provide any method for a union to obtain appellate review of a Board representation decision. With no available appellate review or other administrative remedy, ILA sued in the United States District Court, Southern District of Florida, seeking declaratory relief for the Board's violation of the Act, which requires the Board to ensure employees full freedom of representation of their own choice. ILA also sought a declaration that the Board violated its own rules by accepting review of an Acting Regional Director's Decision and Direction of Election for a generic, catch-all reason not expressly authorized under Section 102.67, and that this violation deprived ILA and employees of due process and infringed First Amendment rights of association and property interests in representation of the unit. Subject matter jurisdiction existed because ILA sued for violation of the Act, a federal statute, and for violation of Constitutional rights.

The district court dismissed ILA's Complaint, however, concluding that representation decisions under 29 U.S.C. § 159(c) are solely within the purview of the Board (App. B at 7a, 10a). The district court held that the Board is not required to articulate a basis for accepting review of one of its regional director's representation decisions, notwithstanding ILA's allegations that the Board accepted review for a reason other than one of the four narrow bases enunciated in Section 102.67 (App. B at 10a). The district court also held that the Board satisfied any such obligation

by claiming that it accepted review of the Acting Regional Director's Decision because of the existence of "substantial issues warranting review." The Eleventh Circuit Court of Appeals *per curiam* affirmed the district court's dismissal.

The district court's decision and subsequent affirmance merit review in this Court because the decision centers upon critical, unresolved questions of federal law that significantly impact union and employee rights. Congress vested the Board with vast authority to oversee representation matters, but left unions and employees without any remedy if the Board undermines the purpose of the Act or if the Board disregards its rules and regulations in connection with representation proceedings. This closes the door to judicial review to groups who have no alternative recourse.

REASONS FOR GRANTING THE WRIT

I. A DISTRICT COURT SHOULD HAVE SUBJECT MATTER JURISDICTION TO RENDER DECLARATORY RELIEF TO AN AGGRIEVED PARTY WHEN THE BOARD DISREGARDS ITS OWN RULES, THEREBY VIOLATING A PARTY'S DUE PROCESS RIGHTS.

A. An injured union and employees seeking its representation should have a forum for relief when Board action violates its due process rights.

When a union or employees petition the Board to designate a unit of employees that share a community of interests and desire to be grouped together for purposes of voting for a representative union, the Board must be guided by the strict guidelines enunciated in the Act and by its

internal Statements of Procedure. If the Board disregards either the Act or its own rules, an injured party should have a forum for relief.

The Act does not, on its face, foreclose judicial review of a representation decision designating a group of employees as a unit and scheduling an election. Because the designation of a unit is not a final proceeding, however, courts have historically construed the Act as prohibiting immediate appellate review. *Boire v. The Greyhound Corporation*, 376 U.S. 473 (1964). Conceptually, following a representation decision, neither an employer nor a union is entitled to direct appellate review. As this Court explained in *Boire*:

> This court held as long ago as *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401, that the final orders made reviewable by §§ 10(e) and (f) in the Courts of Appeals do not include Board decisions in certification proceedings. Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit. In such a case, 29 U.S.C. § 159(d) of the Act makes full provision for judicial review of the underlying certification order by providing that such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed in the Court of Appeals.

Boire, 376 U.S. at 476-7. This Court further noted that the principle of non-reviewability had been legislatively created to protect unions and employees from attrition that would likely result if an employer had the ability to impede the election process through a lengthy appeal following a union election victory. *Id.* at 478, citing H.R. Rep. No. 972, 74th Congress, First Session, 5.

As one court analyzing the principle of non-reviewability explained, "This statutory scheme was designed by Congress to prevent the delays in the election and certification process that were thought to be inevitable if frequent recourse to pre-election review were permitted." *N.L.R.B. v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 105 (3d Cir. 1979). *See Catalytic Industries Maintenance Company v. Compton*, 333 F. Supp. 533, 536 (D. Puerto Rico 1971) ("This policy of non-reviewability is based upon the explicit congressional mandate that representation proceedings be expeditiously resolved and that **employee collective rights attendant thereto** be effectuated free of time consuming delays which would necessarily flow from direct judicial review.") (emphasis added). *See also Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1163 (5th Cir. 1969) (holding that the reason for circumscribing court interference in representation matters is to avoid dilatory tactics when the "employer really had no substantial objections to the conduct of the election other than a desire to delay bargaining as long as possible").

Although Congress may have intended to limit both an employer's and a union's ability to appeal a representation proceeding, an aggrieved employer retains the enviable power to obtain such review by refusing to bargain with a prevailing union, thereby compelling the Board to initiate an unfair labor practice charge under 29 U.S.C. § 160. That section

authorizes a circuit court to review, by direct appeal, an unfair labor practice charge as well as the underlying representation decision that precipitated the unfair labor charge. *Interstate Dress Carriers, Inc.*, 610 F.2d at 107. Although employers have the power to appeal the representation decision, conversely, the aggrieved union has no such right. *Id.* at 109. This one-way street is particularly dangerous because bargaining unit determinations are the key to a union's organizational efforts. Employers have historically diffused union influence by seeking larger bargaining units because the larger and more diverse the unit, the more difficult it is for a union to organize and represent those employees. The ultimate unit determination in this case, contrary to the original unit designated by the Acting Regional Director, has such breadth and diversity that it precludes ILA's entrance into the employer's workplace — regardless of employee choice.[1] This frustrates the very purpose of the Act. Also, by refusing to bargain with a union to compel an unfair labor practice charge, the employer retains the power to impede employees' representation choice and to obtain a lengthy review — the very delay Congress sought to avoid.

Because a losing union cannot initiate an unfair labor practice charge, hopes of appellate review are squelched. Additionally, if district courts refuse to accept jurisdiction out of deference to the Board's authority, unions and employees have no means of relief. When, as in this case, the Board deems that a representative unit comprised of all

1. The ultimate unit designated by the Board here is comprised of employees ranging in diversity from a laborer to a licensed insurance claims representative. ILA exists to represent the longshoreman. The Board's ultimate designation of a unit comprised of all employees prevents ILA from organizing those workers who sought its representation.

employees is the **only** appropriate bargaining unit, the aggrieved union loses the ability to organize the employees in the future. The employees who sought ILA's representation are left with none. Instead, they are subsumed within an oversized unit that, even if eventually unionized, will not have the capacity to address their particular needs. Therefore, the Board effectively deprives those employees of freedom of representation.

This Court rejected the notion that a losing union should be deprived of access to judicial review in *Leedom v. Kyne*, 358 U.S. 184 (1958), which articulated a well-settled, albeit narrow, exception to non-reviewability. In *Leedom*, this Court held that a district court obtains jurisdiction to entertain a direct action by a union when the Board violates a specific statutory mandate. *Id.* at 188. This Court explained that a district court is not actually reviewing the Board's representation decision, but is striking down action in derogation of the Board's authority. Significantly, this Court noted the union's inability to obtain alternative relief as a critical factor in creating the exception. *Id.* at 190.

Before *Leedom*, the Second Circuit Court of Appeals announced another exception to non-reviewability in *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), where it concluded that a district court had jurisdiction to enjoin the Board from taking action which would infringe a constitutional right. In *Fay*, the plaintiff had alleged that the union had a property interest in maintaining its position as a bargaining agent and that the Board invaded this interest. The Second Circuit held that when a plaintiff alleges deprivation of a constitutional right that is not transparently frivolous, the district court should exercise jurisdiction over the representation matter and any other questions regardless of whether they are independently justiciable. *Fay*, 172 F.2d at 724.

Courts applying or distinguishing *Fay* have noted the unavailability of any alternative remedy as a relevant factor in deciding that the district court has jurisdiction. As one district court opined in distinguishing *Fay*:

> Those cases [*Fay* and its progeny] involved situations where District Court intervention in Board proceedings was necessary to prevent irreparable injury to a party's constitutional rights because no other adequate avenue for review existed. Thus, *Fay v. Douds*, *supra*, concerned a final determination by the Board that an incumbent Union could not participate in a representation election; the Union would have been entirely without recourse had the District Court not assumed jurisdiction over the constitutional claim raised by the Union.

Semi-Alloys, Inc. v. Morio, 490 F. Supp. 422, 425 (S.D. N.Y. 1980). Although various circuit and district courts have considered whether a union's assertion of the Board's violation of a constitutional right vests a district court with jurisdiction to hear the case, this Court has never addressed this critical jurisprudential question, leaving both an unresolved question of federal law and a conflict among various circuits.[2]

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2. *See Local 25, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, et al. v. Greene*, 196 F. Supp. 772, 773 (D.C. Mass. 1961) (characterizing *Fay* as a well-recognized exception to non-reviewability); *McCormick v. Hirsch*, 460 F. Supp. 1337, 1347 (M.D. Pa. 1978) (applying *Fay* and concluding that jurisdiction is appropriate when the plaintiff made a showing that his constitutional rights would be infringed regardless of section 10 of the Act); *Boyles*

(Cont'd)

(Cont'd)
Galvanizing Co. v. Waers, 291 F.2d 791, 792 (10th Cir. 1961) (noting jurisdiction if Board violates due process); *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. App. 1969), *cert. den.*, 393 U.S. 1016 (observing that court can enjoin Board action that violates the constitution); *Florida Bd. of Bus. Reg., Div. of Pari-Mutual Wagering v. N.L.R.B.*, 686 F.2d 1362, 1373, n.12 (11th Cir. 1982) (identifying *Fay* as one of three extraordinary circumstances justifying district court jurisdiction in a dispute arising out of a Board representation proceeding); *Catalytic Ind. Maintenance Co. v. Compton*, 333 F. Supp. 533, 537 (D. Puerto Rico 1971) (recognizing *Fay* exception to non-reviewability but refusing to apply it); *University of Vt. v. Vt.*, 748 F. Supp. 235, 244 (D. Vt. 1990) (applying *Fay* and concluding that district court had jurisdiction to review claims of constitutional deprivations by the Board that are not transparently frivolous); *United Fed. Of College Teachers v. Miller*, 479 F.2d 1074 (2d Cir. 1973) (recognizing the *Fay* exception); *U.S. Pillow Corp. v. McLeod*, 208 F. Supp. 337, 340 (S.D.N.Y. 1962) (recognizing *Fay* but finding no deprivation of due process); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969), *cert. den.*, 394 U.S. 1012 (recognizing the *Fay* exception); *Int'l Assoc. of Tool Craftsmen v. Miller*, 389 F. Supp. 1078, 1083, n.1 (E.D. Tenn. 1974) (recognizing the *Fay* exception); *Amalgamated Meat Cutters, etc. v. Allen*, 298 F. Supp. 985, 990 (W.D. Mo. 1969) (assuming that *Fay* applies but refusing to find a Constitutional violation); *Teamsters, Chauffeurs, etc. v. N.L.R.B.*, 375 F.2d 966, 970 (9th Cir. 1967) (recognizing the *Fay* exception); *Bakery, Confectionery and Tobacco Workers' Intern. Union, Local 6 v. N.L.R.B.*, 799 F. Supp. 507, 510 (E.D. Pa. 1992) (questioning the continuing validity of the *Fay* exception and noting that the Supreme Court has not adopted it); *See Interstate Dress Carriers*, 610 F.2d 99 at 106 (noting that *Fay* has not been adopted by the Supreme Court); *See Greensboro v. Hosiery Mills, Inc. v. Johnston*, 377 F.2d 28, 32 (4th Cir. 1967) (reversing the district court and concluding that *Fay* does not apply in the Fourth Circuit); *Southern Ohio Coal Co. v. Surface Min., Reclamation and Enforcement, Dep't of Interior*, 20 F.3d 1418, 1425 (6th Cir. 1994) (relying on *Fay*); *Squillacote v. Int'l Brotherhood of*
(Cont'd)

This Court should address the issue and resolve whether the Board's violation of a union's due process or other Constitutional rights vests jurisdiction in a district court to afford relief. ILA alleged that the Board's disregard for its own rules violated ILA's due process and First Amendment rights of association with those employees who sought its representation. *See Professional Assoc. of College Educators v. El Paso Cty. Community College Dist., et al.*, 730 F.2d 258, 262 (5th Cir. 1984) (holding that the First Amendment right of association extends to unions as well as those employees seeking its representation).

(Cont'd)

Teamsters, Local 344, 561 F.2d 31, 37-8 (7th Cir. 1977) (analyzing *Fay* and rejecting its application); *Blue Cross and Blue Shield of Michigan v. N.L.R.B.*, 609 F.2d 240, 244 (6th Cir. 1979) (treating the *Fay* exception to non-reviewability of the Board's representation decision as dictum and refusing to apply it); *National Maritime Union of America, AFL-CIO v. N.L.R.B.*, 375 F. Supp. 421, 434-35 (E.D. Pa. 1974) (noting that *Fay* preceded *Leedom v. Kyne* and that the doctrine established therein has never been recognized by the Supreme Court and that the Second Circuit has limited it to denials of procedural due process); *Grutka v. Barbour*, 549 F.2d 5, 10, n.7 (7th Cir. 1977) (questioning viability of *Fay* but deeming it inapplicable under the facts of the case); *Midway Clover Farm Market, Inc. v. N.L.R.B.*, 318 F. Supp. 375, 378-79, n.2 (D. D.C. 1969) (finding no violation under *Fay* and noting that it has never been recognized by the Supreme Court); *Sav-On Drugs, Inc. v. Cuneo*, 46 Lab. Cas. P. 17903 (D. N.J. 1962) (acknowledging *Fay*, but refusing to apply it); *United States Metal Co. Employees' Assoc. v. United States, N.L.R.B.*, 478 F. Supp. 861, 863-64 (W.D. Pa. 1979) (rejecting application of *Fay* exception and noting that the Third Circuit has not accepted the doctrine); *Hughes v. Getreu*, 266 F. Supp. 15, 17 (S.D. Ohio 1967) (noting that only the Second Circuit adhered to the *Fay* exception); *Cihacek v. N.L.R.B.*, 464 F. Supp. 940, 944 (D. Ne. 1979) (recognizing *Fay* but noting that it has never been adopted by the Supreme Court and has been criticized by certain circuits).

In *McCormick*, a district court analyzed whether it had subject matter jurisdiction to enter an injunction relating to a representation proceeding when the plaintiff alleged a First Amendment violation pertaining to religious freedom. The court concluded that the Board could not proceed in any manner that would infringe basic constitutional rights. *McCormick*, 460 F. Supp. at 1342. In applying *Fay*, the Court observed, "[I]f the action of the NLRB is unconstitutional, it would be *per se* beyond the Board's jurisdiction and in conflict with the legislative intent of the Act." *Id.* at 1343. As the Court continued, "Certainly, if the protection of any right is sufficiently extraordinary to require immediate review, it is an allegation that First Amendment rights are on the verge of being abused." *Id.*

B. Whether the Board's disregard for its own rules and operating procedures constitutes a violation of due process rights, thereby supporting district court jurisdiction under *Fay v. Douds*, remains an open question.

ILA sought a declaration that the Board violated Board Statements of Procedure Sections 102.21 and 102.67 by accepting review of an otherwise final Decision and Direction of Election rendered by its Acting Regional Director for a stated basis that fell outside the four categories set forth in Section 102.67. This Court should address whether the Board's disregard for its internal operating procedures constitutes a violation of due process that supports district court jurisdiction under *Fay*.

Circuit courts have recognized that Section 102.67 is a strict limitation upon the Board's authority to review a regional director's decision. *See N.L.R.B. v. Sav-On Drugs,*

Inc., 704 F.2d 1147, 1149 (9th Cir. 1983) (recognizing that regional director's decisions are not merely intended to be advisory or recommendations, but are intended to be final unless reviewed for the limited bases set forth in the rule and further noting that "the grounds for review listed in the regulations are quite limited"); *See also N.L.R.B. v. Difco Laboratories, Inc.*, 389 F.2d 663, 667 (6th Cir. 1968) (observing that a regional director's decision may be reviewed by the Board but that Board regulations "severely limit the scope of review"). This is consistent with the well-settled principle that an administrative agency is bound by its own rules and regulations and that an agency's failure to abide by its rules is a due process violation. *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) ("An agency's failure to follow its own regulations . . . may result in a violation of an individual's constitutional right to due process."); *Sameena, Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("Where a prescribed procedure is intended to protect the interests of a party before the agency, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed."); *See International House v. N.L.R.B.*, 676 F.2d 906, 911 (2d Cir. 1982) ("The application of due process to NLRB proceedings, like other administrative proceedings, is not novel."). As the Eleventh Circuit Court of Appeals held:

> It is well-established that when an agency establishes rules to govern its proceedings, these rules must be scrupulously observed. It is equally well-established that it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it.

Kabeller, Inc. v. Busey, et al., 999 F.2d 1417, 1419 (11th Cir. 1993) (citations omitted); *See Associated Builders & Contractors of Texas Gulf Coast, Inc. v. U.S. Dept. of Energy*, 451 F. Supp. 281 (S.D. Tx. 1978) ("Procedural due process requires the government to adhere to its own rules."). An agency's failure to follow its own rules renders a decision in violation thereof invalid. *United States v. Nixon*, 418 U.S. 683 (1974); *See Hupart v. Board of Higher Ed., City of New York*, 420 F. Supp. 1087, 1106 (S.D.N.Y. 1976) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.").

The competing doctrines of administrative deference and due process protection are at the core of the question before the Court. In *Fay*, the Second Circuit attempted to strike a balance by recognizing that representation matters are within the purview of Board authority, but that a violation of Constitutional rights supports district court jurisdiction to offer a remedy. The balance tilts in ILA's favor because, as in *Leedom v. Kyne*, ILA has no alternative remedies. *See Board of Governors of the Federal Reserve System v. M Corp. Financial Inc., et al.*, 502 U.S. 32 (1991) ("First, central to our decision in *Kyne* was the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights."). Due process principles should override administrative deference, particularly when the administrative agency provides no alternative method for review. *See Bivines v. Bowen*, 833 F.2d 293, 296 (11th Cir. 1987) ("[T]he deference which we accord administrative agencies is tempered by the fact that our duty to protect due process and fundamental fairness is paramount to the

agency's otherwise untrammeled right to implement its self-promulgated procedures."); *Call v. Heckler*, 647 F. Supp. 560, 563 (D. Mont. 1986) ("The courts, to protect due process, must be particularly vigilant and must hold agencies . . . to a strict adherence to both the letter and the spirit of their own rules and regulations.") (citing *Powell v. Heckler*, 789 F.2d 176, 178 (3d Cir. 1986)); *See also Atkinson Lines, Inc. v. United States*, 381 F. Supp. 39, 41 (S.D. Oh. 1974) (holding that deference to an administrative agency "must not be viewed as an abdication by the courts of an obligation to scrutinize carefully agency rulings and reverse those that do not comport in the due process or with fundamental justice"). *First Fed. Sav. and Loan Assoc. of Lincoln v. Casari*, 667 F.2d 734, 740 (8th Cir. 1982) ("As noted by the court, even where otherwise withdrawn, judicial review of administrative agency determinations is always available to assure agency compliance with internal procedures."); *Graham v. Caston*, 568 F.2d 1092, 1097 (5th Cir. 1978) ("Judicial review is available where [an] administrative agency fails to follow procedures outlined in regulations adopted by that administrative agency.").

If the Board followed its own rules here, it would have denied review of the Acting Regional Director's Decision and Direction of Election, counted the ballots, and recognized the employees' free choice. By disregarding its self-imposed limitation and by granting review merely because it disagreed with the Acting Regional Director, the Board undermined the Act.

II. WHETHER THE BOARD'S RULES AND REGULATIONS SHOULD BE TREATED AS STATUTORY MANDATES FOR APPLYING *LEEDOM v. KYNE* IS UNRESOLVED.

In *Leedom*, this Court held that the Board's violation of an express statutory mandate supports district court jurisdiction. This Court should address whether the Board's internal procedural rules should be equated to statutory mandates for purposes of applying *Leedom*. Although various courts have rejected this theory, at least one district court has advanced this exact principle. As explained in *Weingarten, Inc. v. Potter*, 233 F. Supp. 833, 835 (S.D. Tx. 1964):

> Since the rules and regulations and statement of procedure of the National Labor Relations Board . . . were enacted pursuant to authority delegated to the Board by Congress in 29 U.S.C. Section 156, those particular rules which are substantive **have the dignity of statutory enactments for the purpose of *Leedom v. Kyne*. Consequently, a United States District Court has jurisdiction to set aside action by a regional director contrary to a specific prohibition** in one these substantive rules. . . . The National Labor Relations Board having issued a specific rule containing certain prohibitions to cover a particular situation, **neither it nor its regional directors may in the exercise of discretion act contrary to the rule**.

(emphasis added).

ILA alleged that the Board violated its rules by disregarding the finality of the Acting Regional Director's Decision and Direction of Election and reviewing it on grounds other than one of the four enumerated categories set forth in Section 102.67. Rather than identify any of the categories, the Board instead declared that there existed "substantial issues warranting review." This enabled the Board to then engage in *de novo* review and to disagree with the final Decision and Direction of Election. This Court should address whether this violation supports district court jurisdiction under *Leedom*.

III. A UNION SHOULD HAVE THE RIGHT TO DECLARATORY RELIEF BECAUSE THE PRINCIPLE OF NON-REVIEWABILITY WAS CREATED TO PROTECT UNIONS AND EMPLOYEES.

The principle of non-reviewability relied upon by the district court in dismissing ILA's complaint originated as a method of protecting employees when a labor union prevailed in a representation proceeding — not to protect the employer. *See Catalytic Industries Maintenance Company*, 333 F. Supp. at 536; *see also Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308 (D.C. Cir. 1984). As the Second Circuit Court of Appeal observed in *Goethe House New York, German Cultural Center v. N.L.R.B.*, 869 F.2d 75 (2d Cir. 1989):

> As an employer, Goethe House has the option of seeking indirect review of the Board's order by refusing to bargain with the union if it is certified, and then seeking review of its position in a court

> of appeals. In *[Leedom v.] Kyne*, by contrast, the Plaintiff in the District Court was a labor organization. As a labor organization, it did not have the option, available to an employer, to seek indirect judicial review of the Board's action. **Because indirect review was unavailable in *Kyne*, the case for direct review was more compelling.**

Id. at 80 (emphasis added).

Declaratory relief should be recognized as a vehicle for reviewing the Board's representation decision because it does not implicate the concerns which spawned the principle of non-reviewability, such as dilatory tactics which would interfere with elections or the bargaining process. In *Florida Board of Bus. Reg., Division of Pari-Mutual Wagering v. N.L.R.B., et al.*, 686 F.2d 1362 (11th Cir. 1982), the State of Florida filed a district court action to enjoin a scheduled election by a certified bargaining unit and to obtain a declaratory judgment that the Board lacked authority over labor disputes involving jai-alai players. The Board argued that the district court was powerless to render a decision relating to a representation proceeding. However, the reviewing court disagreed, reiterating that non-reviewability was created as a shield to protect the rights of a labor union and employees, not as a sword upon which to impale them:

> The extraordinary circumstances [*Leedom v. Kyne*] rule was fashioned to deal with time-consuming pre-election challenges to board orders which unduly delayed the choice of employee representations. When Congress passed the Act in 1935, it was particularly concerned that board-

> ordered representation elections be held post-haste. When employee organization has built up its membership to a point where it is entitled to be recognized as a representative of the employees for collective bargaining, and the employer refuses to accord such recognition, **the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts.**

Id. at 1368 (emphasis added). The Court concluded that the district court had subject matter jurisdiction under 28 U.S.C. § 1331:

> The state contends, and we agree, that **a plaintiff who cannot seek review of the board's order in the court of appeals but who claims that the board violated his federal rights has the right to repair to the district court under any statute that may grant the district court the power to hear his claim.**

Id. at 1370 (emphasis added). As one author, commenting on the Eleventh Circuit's decision, explained:

> The Eleventh Circuit noted that the Act's legislative history and the extraordinary circumstances rule limit district court jurisdiction when an employer or a rival union attempts to use a district court to delay a board-ordered election. The Court reasoned that a suit for declaratory

> relief would not permit the use of the dilatory tactics the legislature sought to avoid by limiting judicial review.

Union Access to the Courts on NLRB Representation Decisions: The Potential for Declaratory Judgment Procedure to Provide Review, 37 Cath. U.L. Rev. 119, 139 F. Frio. Therefore, a pending question exists regarding federal law as to whether the concept of non-reviewability conceived to protect employees and unions should be applied as a means of preventing them from obtaining review and declaratory relief. This Court should grant the requested Petition to resolve this and the other unresolved federal questions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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